Commonwealth of Massachusetts
State Ethics Commission

One Ashburton Place, Room 619, Boston, MA, 02108
phone: 617-727-0060, fax: 617-723-5851

CONFLICT OF INTEREST OPINION
EC-COI-93-6

FACTS:

You are a police officer in the Town of ABC and the President of the ABC Police Relief Association (the Association). The Association is a private, voluntary organization of ABC police officers that raises funds for charitable purposes, including a drug and alcohol abuse prevention program and special events for children.

The Association wishes to solicit donations from ABC residents and businesses. It may wish to employ a professional solicitor for this purpose.

QUESTION:

What limitations does G.L. c. 268A establish for your and the Association's solicitation activities?

ANSWER:

You and the Association may solicit funds from the public, but §23(b)(2) of G.L. c. 268A prohibits police officers,[1/] in their solicitation of funds from the public, from:

1. Making statements or engaging in conduct exploiting official police powers, i.e., that would lead reasonable persons to infer that good or bad consequences in official dealings with the police might flow from a decision whether or not to donate.

2. Using official resources of substantial value, including paid time as on-duty police officers, or (even when off-duty) official telephones, copying or fax machines, other public supplies or facilities, official stationery or letterhead, any municipal seal or coat of arms, or badges or uniforms.

In addition, G.L. c. 68, §§18-35[2/] and G.L. c. 41, §98E,[3/] statutes not administered or enforced by this Commission, apply to your and the Association's solicitation activities.

DISCUSSION:

You and other ABC police officers are "municipal employees" for the purpose of the state conflict of interest law. G.L. c. 268A, §1(g). As such, you and they are subject to §23(b)(2) of the conflict law, which prohibits current public employees from using their "official position[s] to secure for [themselves] or others unwarranted privileges or exemptions which are of substantial value and are not properly available to similarly situated individuals."

Whenever public employees solicit anything of substantial value[4/] for a non-governmental purpose, the Commission has consistently scrutinized the solicitation for compliance with §23(b)(2). In particular, we have examined whether public employees are soliciting from those with whom they have official dealings, and whether the solicitation is using public resources for non-governmental purposes. We must therefore analyze your solicitation activities in both of these respects.[5/]

1. Soliciting from regulated persons.

The Commission has consistently held that §23(b)(2) prohibits public employees, in both their public and

private capacities, from soliciting anything of substantial value from persons within their regulatory jurisdiction[6/] for a non-governmental purpose, unless the solicitation is specifically authorized by law.[7/] *See, e.g., EC-COI-92-28* (Governor may not solicit donations to non-governmental entity from corporations subject to state regulation); *92-12* (state board member prohibited from privately soliciting individuals under his regulatory authority); *92-2* (legislator's financial aid committee prohibited from soliciting anyone with an interest in legislative business, broadly defined); *90-9* (state official prohibited from soliciting vendors of his agency to support political candidate). The Commission has based this conclusion on its long experience with what the opinions just cited call the "inherently exploitative" or "inherently coercive" circumstances of such solicitations. For examples of Commission enforcement actions presenting such circumstances, see *In re Pezzella*, 1991 SEC 526, 528 (disposition agreement fining Governor's staff member for unauthorized solicitation of Governor's appointee to advance friend's private interest); *In re Singleton*, 1990 SEC 476 (disposition agreement fining a fire chief for attempting to use his official position to solicit private business); *In re Burke*, 1985 SEC 248 (fining official for using his official position to obtain access for private purposes to persons his agency regulated);[8/] *In re Lannon*, 1984 SEC 208 (disposition agreement fining school superintendent for soliciting loans from subordinate teacher);[9/] *In re Antonelli*, 1982 SEC 101 (fining county treasurer for soliciting personal loan from banks seeking deposits of county funds); *Compliance Letter 82-2*, 1982 SEC 80 (soliciting city employees, vendors and city-regulated businesses for contributions to Mayor's wife's "birthday party" violated predecessors of §23[b][2], [3]).[10/]

Our usual concern about solicitation by public employees is exacerbated here by the substantial and pervasive authority of police officers over all residents of and businesses in the municipality, including the statutory powers to carry weapons and make arrests, *see* G.L. c. 41, §98, and to make warrantless administrative inspections of certain regulated businesses. *See* G.L. c. 140, §66; *Commonwealth v. Eagleton*, 402 Mass. 199 (1988). In this connection, we note that the Attorney General's Division of Public Charities has officially warned of the special problems that solicitations by police and firefighter organizations pose, and has cautioned citizens "not [to] feel threatened or intimidated by [such a] solicitation, or pressured to make a donation." Attorney General, *Report on Charitable Fundraising* 8 (Nov. 1992).

On the other hand, the Legislature has specifically addressed these solicitations by enacting G.L. c. 41, §98E, which provides in its entirety: "No person or persons shall solicit the public in any manner or form using the word `police' or `firefighter' or any derivative thereof without using the name or names of the city or town police or firefighters organization sponsoring such solicitation." Conscious of our duty to construe statutes relating to the same subject together "so as to constitute an harmonious whole consistent with the legislative purpose," *Saccone v. State Ethics Commission*, 395 Mass. 326, 334 (1985), we recognize that §98E in effect condones some solicitations by police and firefighter organizations, subject to the identification requirement it establishes. *See EC-COI-92-28* n.4; *92-12* n.10 (both suggesting that campaign finance law's exemption of elected officials from prohibition against compensated public employees' soliciting or receiving political campaign contributions, in G.L. c. 55, §13, in effect generally allows such officials to solicit political contributions in their private capacities for purpose of §23[b][2]). In effect, notwithstanding our usual "per se" interpretation of §23(b)(2) as prohibiting all unauthorized solicitations by public employees of those they oversee, §98E allows private solicitations by police and firefighter associations under certain conditions.

It does not follow from §98E, however, that no other statute regulates solicitations by associations of police officers. "Statutes which do not necessarily conflict should be construed to have consistent directives so that both may be given effect." *Kargman v. Commissioner of Revenue*, 389 Mass. 784, 788 (1983). Certainly, G.L. c. 68, §§18-35 apply; these statutes are concerned, for example, with false or deceptive solicitations, and are enforced by the Attorney General's Division of Public Charities.

The same rule of construction applies to §23(b)(2) of the conflict law. *See, e.g., EC-COI-92-12* (comprehensive statutory regulation of campaign finance in G.L. c. 55 did not prevent applying §23[b][2] to soliciting campaign contributions in some contexts). This is especially true in view of the courts' consistent recognition of the conflict law as "comprehensive legislation [enacted to] strike at . . . inequality of treatment of citizens and the use of public office for private gain." *Everett Town Taxi, Inc. v. Board of Aldermen of Everett*, 366 Mass. 534, 536 (1974); *McMann v. State Ethics Commission*, 32 Mass. App. Ct. 421, 427 (1992) (both quoting Special Commission on Code of Ethics, *Final Report*, H. 3650, at 18 [1962]). Here, §23(b)(2) at least forbids statements or conduct by police officers that exploit their official powers. Since §23 (as appearing in St. 1986, c. 12, §14) imposes liability for violations committed "knowingly, or with reason to know," the test is not whether the public employee subjectively intends the statement or conduct to be coercive, but whether reasonable

persons would infer from it that good or bad consequences in their official dealings with the police might flow from their decisions whether or not to donate.

Thus, examples of prohibited solicitation activities would include: representing that a donation (including purchasing tickets to a fundraising event or purchasing an advertisement in a publication) could result in preferential police treatment, or that failure to donate could result in police reprisals;[11/] implying that a decision whether or not to donate could affect the timing or quality of police services;[12/] and the practice (mentioned in our public request for comments, *see* note 5 *supra*) of sending stickers or decals intended for display on donors' private automobiles, from which, in our judgment, reasonable persons would infer the hope of favorable treatment — or of avoiding adverse treatment — by the police.[13/] On the other hand, if police officers (personally and through their association and agents, see part 3 below) do not engage in such prohibited activities, and do not use official resources (see part 2 below), G.L. c. 268A will not prohibit them from soliciting funds for their private association from the public — whether through advertisements, telephone or door-to-door solicitations, or fundraising events.

2. Prohibited use of official resources.

We have also consistently held that §23(b)(2) prohibits public employees from using official resources for private purposes. *E.g., Commission Advisory No. 4 (Political Activity)* (1992) (public resources "are intended for the conduct of public business, not for advancing the personal, private or political interests of public employees"); *Public Enforcement Letter 92-3* ("public resources may only be allocated for public business, and may not be utilized to address individual concerns of public employees"); *EC-COI-92-5* (using state seal or state coat of arms for campaign purposes "benefits a personal rather than a public interest," hence prohibited by §23[b][2]).

Far from limiting this principle, G.L. c. 41, §98E (quoted in part 1 above) supports it. That statute seems clearly intended to distinguish police officers' private solicitations from their public duties; that is the same purpose served by §23(b)(2) in prohibiting use of public resources for private purposes. While we recognize and commend the many beneficial purposes for which police associations raise funds, §23(b)(2) — and the principle it embodies, of public employees' accountability for their use of public resources — applies "even if [these purposes] are public-spirited in nature." *Public Enforcement Letter 92-3*.

Therefore, police officers may not solicit for their private association while on duty. Even when off duty, they may not use official resources of substantial value, including official telephones, copying or fax machines, or other public supplies or facilities.[14/] They may not use official stationery or letterhead, any municipal seal or coat of arms, or badges or uniforms, in their private solicitation activities, because these public insignia "could reasonably be perceived as an endorsement by a public agency of the solicitation[,] give[] the appearance that the solicitation is officially sponsored [or] foster a sense of credibility [that] the solicitation might not otherwise have had." *EC-COI-92-5*. *See Public Enforcement Letter 89-4*, 1988 SEC 369; *In re Buckley*, 1983 SEC 157. For similar reasons, they may not use their official police rank,[15/] since we have found an appointed public employee's official title to be a public resource for this purpose. *EC-COI-92-39* and cases cited.

3. Application to associations and agents.

Section 23(b)(2) applies not only to personal acts of public employees, but also to acts of their agents, so long as the public employees know or (in the words of §23) have "reason to know" of those acts taken on their behalf. Thus, we have previously applied §23(b)(2) to public employees' associational activities. In *Compliance Letter 82-2*, 1982 SEC 80, we attributed to Boston Mayor Kevin White the solicitation activities of a "Birthday Celebration Committee" composed of his close associates, since he knew the general nature of the solicitation activities, although he did not know exactly whom the "Committee" was soliciting.[16/] More recently, in *EC-COI-92-23*, we advised Town Clerks that they would violate §23(b)(2) if their private association accepted funds from a private news service in return for the Clerks' calling the service with immediate election results.

We acknowledge the constitutional rights to associate and to solicit funds for charitable purposes. *See, e.g., Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988). However, narrowly tailored regulation is permissible to promote the compelling government interest in the integrity of public employees. *See Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *National Treasury Employees Union v. United States*, 788 F. Supp. 4 (D.D.C. 1992). There is an important public interest in regulating even the off-

duty activities of police officers to promote public integrity, especially if (as here) the activities do not constitute "pure" speech. *See O'Brien v. DiGrazia*, 544 F.2d 543 (1st Cir. 1976), *cert. denied*, 431 U.S. 914 (1977); *Broderick v. Police Commissioner of Boston*, 368 Mass. 33 (1975); *Wilmarth v. Town of Georgetown*, 28 Mass. App. Ct. 697, 701-03, *further appellate review denied*, 408 Mass. 1103 (1990). We are satisfied that our narrow application of §23(b)(2) here, to prohibit both specific exploitation of official police powers and the use of official resources for the purpose of private solicitations, easily meets the constitutional standard.[17/]

Therefore, this opinion's advice applies to police officers when acting through the Association and its agents, including any "professional solicitor" (defined in G.L. c. 68, §18) that it retains. We note that G.L. c. 68, §22 requires most contracts between charitable organizations and professional solicitors to be in writing and to be filed with the Attorney General's Division of Public Charities, and you would be well advised to include contract provisions that incorporate this opinion's conclusions in order to indicate reasonable efforts to seek compliance with §23(b)(2) by the association's professional solicitor.

DATE AUTHORIZED: January 26, 1993

[1/]This advice applies to police officers' private solicitation activities whether taken personallly or through their private association or agents, acting on their behalf with their knowledge or reason to know, as discussed in part 3 below.

[2/]These statutes regulate charitable solicitations in general and are enforced by the Attorney General. You may obtain information about them from the Attorney General's Division of Public Charities.

[3/]As discussed in part 1 below, §98E requires anyone soliciting the public using the word "police" or "firefighter" (or any derivate thereof) to use the name of the police or firefighters organization (here, the "ABC Police Relief Association") sponsoring the solicitation.

[4/]Anything valued at $50 or more is "of substantial value." *Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976); *Commission Advisory No. 8 (Free Passes)* (1985). Since amounts solicited for a common purpose are aggregated, *see EC-COI-92-23; 92-2*, we assume in this opinion that the total value of all the donations you solicit will be at least $50 and thus "of substantial value."

[5/]Because the application of G.L. c. 268A to solicitations by associations of police officers is an important question of first impression, we publicly invited legal arguments from any interested person. We acknowledge helpful submissions by the law firms of Sandulli, Grace, Shapiro & Horwitz (on behalf of the Massachusetts Coalition of Police, AFL-CIO); Roche, Carens & DeGiacomo; Brooks & Lupan; and Cosgrove, Eisenberg & Kiley, P.C. (on behalf of the Massachusetts Police Association).

[6/]The Commission has reached the same conclusion about soliciting others with whom a public employee has official dealings, including subordinate employees and agency vendors. *See EC-COI-92-7*.

[7/]General Laws c. 268A, §3(b) also prohibits a public employee from either soliciting or receiving anything of substantial value "for himself" from such persons. *See EC-COI-92-2*. Because your and the Association's solicitations seem from your facts to be on behalf of others than the member police officers themselves, this discussion focuses on §23(b)(2).

In addition, §23(b)(3) may apply. It prohibits a public employee from engaging in conduct that gives a reasonable basis for the impression that any person or entity can improperly influence him or unduly enjoy his favor in the performance of his official duties, but allows the employee to dispel any such impression by written public disclosure. However, its requirements are no more restrictive here than those of §23(b)(2), and in any event could be satisfied by written public disclosure to the police officers' appointing authority.

[8/]The Commission relied primarily on §3 in this case, which was decided at a time when the Commission lacked authority to enforce §23. *See Saccone v. State Ethics Commission*, 395 Mass. 326 (1985); St. 1986, c. 12, §§2, 6 (amending and reenacting §23 and conferring Commission jurisdiction to enforce it as of April 8, 1986). *See also In re Burke*, 1985 SEC 248, 249 nn.4 & 5, 253 n.12.

[9/]The Commission relied on the predecessor of §23(b)(3) here, in circumstances where it would also find a violation of §23(b)(2) today. *See EC-COI-92-7*.

[10/]We decline to abandon this longstanding interpretation of §23(b)(2) and its predecessors, as we have been urged on various grounds. In particular, any interpretation of "privileges" that excludes gifts of money is belied by the Legislature's 1986 reenactment of what is now §23(b)(2), *see* note 8 *supra*, adding the "knowingly, or with reason to know" and "substantial value" requirements, following our well publicized *Compliance Letter 82-2*. *See Lorrilard v. Pons*, 434 U.S. 575, 580-81 (1978) (when, after agency construes statute, legislature reenacts it without material change, legislature is presumed to adopt agency construction); *Commonwealth v. Miller*, 385 Mass. 521, 524 (1982) (same for judicial construction); 2B N. Singer, *Sutherland on Statutory Construction* §49.09 (5th ed. 1992). Furthermore, the "privilege" here may be best viewed, not as the gifts of money themselves, but as the special consideration from potential donors that police officers are able to obtain for private purposes by exploiting their official powers. Finally, any reading of the phrase "similarly situated individuals" (also added in the 1986 reenactment) to refer only to other police officers would deprive the

statute of much of its meaning; instead, we read it here to apply to others soliciting charitable donations.

[11/]In a civil action by the Attorney General under G.L. cc. 68, 93A, the Superior Court recently enjoined a professional solicitor for a police organization from "falsely" making such a representation. *Commonwealth v. G.M.C. Advertising, Inc.*, No. 91-3472 (Mass. Super., Suffolk Apr. 22, 1992). Our construction of §23(b)(2) forbids such representations whether they are true or false, if reasonable persons would infer that they might be true.

[12/]*See, e.g., In re Singleton*, 1990 SEC 476, 477-78 (fire chief told contractor from whom he was soliciting private construction business that "it could take forever to obtain [necessary Fire Department] inspections").

[13/]In *State Police Ass'n of Massachusetts v. Massachusetts Police Ass'n*, No. 79-2219 (Mass. Super., Middlesex 1979), a consent judgment enjoined an organization of municipal police officers and its professional solicitor from (among other things) falsely representing that automobile bumper stickers sent to donors would give them "a break" if stopped by a state police officer, a representation which the plaintiff state police union alleged to be the defendants' practice. We also note the following statement in a January 15, 1993 letter to this Commission from Kenneth T. Lyons, National President, International
Brotherhood of Police Officers, NAGE, AFL-CIO: "I can assure you that many citizens respond . . . because they believe the window decals prove beneficial if they are involved in any kind of traffic violation."

[14/]For example, the telephone number printed on the Association's stationery appears to be that of the Police Department. This use of public resources for your Association's private purposes must be discontinued (unless authorized by statute or bylaw).

[15/]We believe they may truthfully answer questions asking whether they are police officers.

[16/]By reenacting what is now §23(b)(2) following this widely publicized compliance letter, adding only requirements that would not alter the result, the Legislature is presumed to have adopted this construction of §23(b)(2). *See* note 10 *supra*.

[17/]Since your facts indicate that the Association raises funds solely for charitable purposes, we need not consider here what effect, if any, G.L. c. 150E might have on our analysis if the Association engaged in collective bargaining.